Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FLUOR DANIEL, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit's interpretation of the respective burdens of proof in a failure-to-hire case conflicts with the standards announced by other Circuit Courts of Appeals.
2. Whether the Sixth Circuit's interpretation of the respective burdens of proof in a failure-to-hire case deprived Fluor Daniel of due process of law.
3. Whether the Sixth Circuit's interpretation of the respective burdens of proof in a failure-to-hire case conflicts with its own precedent and with this Court's precedent.
4. Whether the NLRB's interpretation of the respective burdens of proof in a failure-to-hire case conflicts with the Sixth Circuit precedent and with this Court's precedent.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Fluor Daniel, Inc., a Delaware corporation. Fluor Daniel, Inc. is a wholly-owned subsidiary of Fluor Corporation, a Delaware corporation. No publicly held company owns ten percent or more of the Petitioner.

Respondent is the National Labor Relations Board. Intervenors in the appeal below are the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO; International Brotherhood of Electrical Workers, Local Union No. 995, AFL-CIO; and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Plumbers and Steamfitters Local Union No. 198, AFL-CIO.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Fluor Daniel, Inc., respectfully petitions for a writ of *certiorari* to review the judgment of the Court of Appeals for the Sixth Circuit ("the Sixth Circuit").

OPINION BELOW

The opinion of the Sixth Circuit is reported at 332 F.3d 961 (6th Cir. 2003) and reproduced in Petitioner's Appendix (hereinafter "App.") at 1a-25a. The order denying rehearing *en banc* is reported at 2004 U.S. App. LEXIS 11740 (6th Cir., June 10, 2004) and is reproduced in App. at 123a.

JURISDICTION

Judgment of the Sixth Circuit was entered on March 1, 2004, and the order denying panel rehearing and denying

rehearing *en banc* issued on June 10, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

29 U.S.C. §§ 158(a)(1) and (3) (1998) of the Labor Laws of the United States provide as follows:

> (a) Unfair labor practices by employer.
>
> It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this Title;
>
> . . .
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

STATEMENT OF THE CASE

The Proceedings Below

This case arises out of allegations that in 1994 Fluor Daniel, Inc. (Fluor Daniel) at separate job sites in Baton Rouge, Louisiana ("Exxon") and Palo Verde, Arizona ("APS") committed unfair labor practices by refusing to hire approximately 119 voluntary union organizers to work on those job sites. These individuals filed complaints with the National Labor Relations Board. The Regional Directors of the Board issued complaints in Baton Rouge on March 29, 1995 and in Phoenix on April 17, 1995. On April 12, 1995, the General Counsel of the Board ordered consolidation of these charges.

An Administrative Law Judge (ALJ) held 51 days of hearings in Phoenix and Baton Rouge between August 1, 1995 and December 12, 1996. The ALJ issued his decision

on February 6, 1998, finding that Fluor Daniel had violated the Act by unlawfully discriminating against 40 job applicants at Baton Rouge and 79 at Palo Verde.

Relevant to the issues raised in this Petition, the ALJ determined that there were jobs available in which these alleged discriminatees could be hired based on his finding that "from the time Respondent began hiring craftsmen at Palo Verde in June 1994 until February 1996, Respondent hired 962 craftsmen. There were more than enough jobs for all the discriminatees to be hired into their craft." App. at 97a. Regarding Exxon, the ALJ found that Fluor Daniel hired "2800 people to do the job" between January and December 1994. App. at 103a. Based on these findings, the ALJ determined that the Board's General Counsel had satisfied its burden to show the availability of jobs and that the burden of proof then shifted to Fluor Daniel to establish why these individuals were not hired. The ALJ issued his decision on February 6, 1998, determining that Fluor Daniel had failed to satisfy its burden and that it had violated the Act.

Fluor Daniel petitioned for review to the NLRB, asserting numerous bases of appeal, including the position that the General Counsel had failed to satisfy his burden by failing to match each alleged discriminatee with an available job that he or she was qualified to perform. Fluor Daniel specifically relied on the 6th Circuit's decision in *Fluor Daniel v. NLRB*, 161 F.3d 953 (sixth Cir. 1998) (*Fluor Daniel II*). The Board rejected this argument, holding that the General Counsel had satisfied his burden because of the number of jobs available during the life of the two projects. App. at 66a. The NLRB issued a Decision and Order on March 2, 2001 affirming the rulings, findings of fact, and conclusions of law of the ALJ.[1]

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[1] The Board did modify the ALJ Opinion in certain respects, which are not relevant to this Petition.

On March 12, 2001, Fluor Daniel filed a Petition for Review of the NLRB's decision to the United States Court of Appeals for the Sixth Circuit. The NLRB filed its Application for Enforcement on March 29, 2001.

On June 9, 2003, the Court granted the NLRB's cross-petition for enforcement with a minor exception which is not relevant to this Petition. Based on that exception, however, the Court requested that the NLRB submit a proposed judgment that complied with the Court's opinion. The NLRB submitted a proposed judgment and Fluor Daniel objected to that proposed judgment. The Court ultimately entered a modified judgment on March 1, 2004. App. at 124a. Fluor Daniel petitioned for rehearing and rehearing *en banc* on March 15, 2004. The Court denied the petition for rehearing and rehearing *en banc* on June 10, 2004. App. at 123a.

STATEMENT OF THE FACTS

General Background

Fluor Daniel is one of the largest construction contractors in the United States. It provides construction, engineering, maintenance, and other services to customers all over the world.

These cases concern the "salting activities" of the various unions involved. The goals of salting campaigns are widely recognized as follows:

1. To put union members on a job site so as to enable the Union to organize the Company's employees in order to gain recognition either voluntarily or through a Board election.

2. To get union people on the job and create enough trouble by way of strikes, lawsuits, unfair labor practice charges and general tumult, so that the non-union contractor walks away from the job.

3. If number 2 does not work, to create enough problems for the employer by way of unfair labor practice charges, Davis Bacon, OSHA, or legal allegations requiring legal services so that even if the employer does not walk away from the job, he will be reluctant to bid for similar work in the area again.

Ippli, Inc., 321 N.L.R.B. 463, 465 (1996). In the present case, the unions have opted for course #3.

Palo Verde Project

Arizona Public Service (APS) operated the largest nuclear power generating plant in the United States. Bechtel Corporation, a unionized construction company, had done the initial construction and most of the subsequent maintenance, including serving as primary maintenance contractor. Because of performance problems, in 1993, APS elected to seek bids for future maintenance, including work done during scheduled outages.

APS awarded Fluor Daniel the Palo Verde contract. When Fluor Daniel began hiring for the Palo Verde project, it applied its typical hiring practices and preferences subject to the needs identified by APS. Since the construction labor market is broad and fluid, Fluor Daniel generally limits the time which it considers an application active to 60 days.

Fluor Daniel hired 91of the 200 former Bechtel employees who applied. Based on the contract labor requests issued by APS, Fluor Daniel was authorized to hire 111 employees in its base crew, the crew that worked generally year-round providing ongoing maintenance services. The Fluor Daniel base crew was smaller than Bechtel's and had a different mix of crafts; Fluor Daniel's base crew centered around the civil crafts (carpenters and laborers), rather than metal trades or mechanical crafts (such as welders, pipefitters, millwrights, boilermakers, and mechanics). Its base crew included 75 carpenters and laborers and only two pipefitters

and one plumber. There were no ironworkers, millwrights, or boilermakers.[2]

Between the persons identified from its database and the applicants from the general public, Fluor Daniel believed that it had filled its initial base crew needs from the prequalified invitees. On June 16, 20, and 23, Boilermaker organizer Gary Evenson led large groups of mechanical craft applicants (consisting of nineteen boilermakers, six ironworkers, twenty-one millwrights, two asbestos workers, one electrician, and one insulator) to the job site. They displayed union insignia, and listed "volunteer union organizer" on their applications. Their applications were accepted, but, as explained above, there was no need for these crafts in the initial Fluor Daniel base crew.

June 27, 1994 was the hire-in date and most of the previously recruited employees were reporting to the site for processing and orientation. Evenson called that morning, not identifying himself as a union member, and was told Fluor Daniel was not taking applications. Nonetheless, he then led 25 individuals to the Fluor Daniel trailer at the site to submit applications. Evenson ignored the sign on the trailer indicating that Fluor Daniel was not accepting applications and asked Dean Hamrick, the company recruiter, why no applications were being taken. Hamrick explained that they were busy processing the base crew and that they would post a sign showing whatever employees were needed in the future, or that they could call back and check to see whether applications were being accepted.

For these reasons, the Company did not accept applications from the uninvited arrivals at the job site on June 27. On June 28, after identifying the no-shows from the pre-qualified invitees, Fluor Daniel realized that it needed eleven more

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[2] Of the 111 employees hired for the base crew, 48 were former Bechtel employees.

carpenters, seven utility employees, and one HVAC employee. It reopened applications for those crafts, as well as recruiting from its historical workforce.

The anticipated fall outage of 1994, which would have required significant mechanical craftsmen (welders, millwrights, pipefitters) was postponed until early 1995. Therefore Fluor Daniel performed no outages in 1994.

In general, as explained above, Fluor Daniel applications are valid for only 60 days. If an applicant is not hired within that time frame and wishes to be considered for future openings, he or she must return and complete a new application. On the Palo Verde project, the applications clearly reflected that they were valid for only 60 days. On that project, nuclear power unit outages were generally anticipated in advance and interested candidates, especially those who had previously worked on the project, could have predicted when their services might have been needed. In fact, applicants who did return to the site to submit new applications after their original applications expired were hired.

Following its practices enabled Fluor Daniel to achieve the goals it had set when it bid on the project with APS, reducing the staffing and shortening the outages. In fact, the November 4, 1996 outage took only 39 days, the shortest nuclear unit outage ever at APS.

Exxon Project

In 1993, the East Coker unit of an Exxon refinery in Baton Rouge, Louisiana was destroyed by a fire. Exxon contracted with Fluor Daniel to rebuild the unit for completion by July 1994. Because of the urgent nature of the project and the lack of advance notice and preparation time, Fluor Daniel kept applications active for only 30 days instead of the normal 60.

From December 1993 to February 1994, the work on the Exxon project was primarily civil in nature and there was

minimal need for mechanical craftsmen and electricians. It was anticipated, however, that, when the work progressed beyond the foundation stages, there would be a rapid need for a number of employees from a variety of crafts. Human Resources Manager Bill Austin wanted to be prepared for what he expected would be a need for employees from various crafts and decided to accept applications from the public for these crafts, even though Fluor Daniel had not exhausted its internal database resources for employees in these classifications and the company was not yet hiring for any of these positions. Thus, in January 1994, these positions were posted in the office.

Prospective applicants inundated the office and overwhelmed the small human resources staff. These groups included a number of union members, many of whom went to the project at the suggestion of union organizers such as Ricky Russell. Even though Russell knew that the electrical work on the project would not begin until August, he led a group of electricians to the site where they completed applications on January 19, 1994. Austin explained that the applications would only be considered valid for 30 days and explained the hiring procedure and preferences Fluor Daniel would use. None of these electricians were Fluor Daniel experienced or certified, and eight of the ten indicated on their applications that they were union members. Additional groups of union members applied at various times between January 25 and August 30. Many of these applicants were electricians, but the groups also included pipefitters and boilermakers.

These applicants were considered according to Fluor Daniel's standard hiring protocol, with preferences being given to those with Fluor Daniel certification or experience and applications being kept active for the 30-day time period. Fluor Daniel's hiring decisions at Exxon were based exclusively on its need (as reflected by craft requisitions

forwarded by craft superintendents) and the neutral hiring preferences and policies. The alleged discriminatees were treated the same as all other applicants.

The ALJ and NLRB Decision

The clear message of the General Counsel and unions, ultimately adopted by the ALJ and NLRB, was that Fluor Daniel had to be punished for desiring to operate on an open shop basis. Every possible inference, regardless of a lack of justification, was taken against the company on the issue of anti-union animus. Against that background the ALJ and NLRB then allowed the General Counsel to by pass his burden of identifying and challenging specific hiring decisions. Rather, he has purported to satisfy his burden by the broad-brush allegation that enough individuals were hired during the life of these jobs to cover all of them. As there was no way to defend against such an improper premise, the ALJ and Board found that Fluor Daniel had violated the Act by failing to hire these individuals.

The Sixth Circuit's Decision

While the Sixth Circuit correctly stated the appropriate standard for burdens of proof in a failure-to-hire case citing its own *Fluor Daniel II* decision, it clearly failed to require the NLRB to adhere to that standard and present sufficient evidence to satisfy the NLRB's burden of proof in this case. The Court began by noting that its analysis in *Fluor Daniel II* "clearly articulated the proper burdens of proof in refusal-to-hire cases." App. at 9a. The Court had based that analysis on the NLRB's decision in *Wright Line*, 251 N.L.R.B. 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989, 102 S. Ct. 1612, 71 L.Ed.2d 848 (1982), which in turn was approved by this Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402-03, 103 S. Ct. 2469, 76 L.Ed.2d 667 (1983). *Fluor Daniel II* had recognized that there are two elements to a Section 8(a)(3) violation: "(1)

anti-union animus, and (2) the occurrence of a covered action — for example, a particular discharge or a particular failure to hire." *Fluor Daniel,* 332 F.3d at 968. App. at 10a. The Court went on to say that this analysis requires the General Counsel to "match up applicants with available jobs for which they are qualified . . .". *Id.* (emphasis added). Only then, after the General Counsel had satisfied this burden, does the burden of proof shift to the employer to show why it did not hire the individuals in question.

The Sixth Circuit then noted that after it had issued its *Fluor Daniel II* decision, the NLRB issued its decision in *FES (A Division of Thermo Power)*, 331 N.L.R.B. 9 (2000). App. at 10a. In that decision the Board had attempted to respond to the *Fluor Daniel II* decision and had set forth its own opinions regarding the appropriate burdens of proof in failure-to-hire cases. In *FES*, the Board determined that the General Counsel bears the burden of showing "(1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer had not adhered uniformly to such requirements, or that the requirements were themselves pretextual or applied as a pretext for discrimination; and (3) that anti-union animus contributed to the decision not to hire the applicants." *FES,* 331 N.L.R.B. at 12.

While candidly admitting that "the standard in *FES* could be interpreted as requiring a slightly lesser showing than that we articulated in *Fluor Daniel II*," the Sixth Circuit nonetheless held it was a sufficient showing. *Fluor Daniel*, 332 F.3d at 968. App. at 11a. Applying this lesser standard to the instant case, the Sixth Circuit held that the Board had satisfied its burden because, as the ALJ had determined, the company had hired a sufficient number of employees over the

life of the jobs to have hired all of these alleged discriminatees. *Id.* at 969-70. App. at 12a.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT DECISION CONFLICTS WITH SUPREME COURT PRECEDENT

The Sixth Circuit opinion not only conflicts with its prior decision in *Fluor Daniel II*, it conflicts with this Court's decision in *Transportation Management Corp.* There, the Court stated:

> As we understand the Board's decisions, they have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on antiunion animus. . . The General Counsel has the burden of proving these elements under §10(c). . . .

Transportation Management Corp., 462 U.S. at 401, 76 L.Ed. 2d at 675.

Clearly this Court has defined the prima facie case of an unfair labor practice to include a showing of both anti-union animus and an "adverse action." In a failure-to-hire case, that adverse action must involve an actual failure-to-hire. There must be a job available into which an applicant must be hired. That applicant must be qualified and available to work. Moreover, he or she must actually desire and intend to work. Finally, the General Counsel must identify the specifically available job so that an initial determination can be made as to whether a hiring decision actually occurred and, if so, a proper comparison can be made to determine respective qualifications. By allowing the General Counsel to avoid the necessity of identifying specific hiring decisions and matching potential applicants to available jobs, the Sixth Circuit has eased the burden on the General Counsel to

showing nothing more than anti-union animus. This easing of the burden fails to satisfy this Court's requirement for a prima facie case.

II. THE SIXTH CIRCUIT DECISION EXEMPLIFIES THE CONFLICT AND CONFUSION AMONG THE CIRCUIT COURTS

The Supreme Court should now review the decision at issue so that it can definitively state the respective burdens of proof in a failure-to-hire case. There are at least two different standards coming out of the Sixth Circuit in the two Fluor Daniel cases. *Fluor Daniel II* correctly requires that the General Counsel match job applicants to available jobs for which the employer is actually hiring. The instant *Fluor Daniel* case allows the General Counsel to bypass this burden and show only that the employer hired many employees during the life of particular projects—without reference to any particular hiring decision.

There is another standard announced by the NLRB in *FES* — one that specifically rejects the standard announced by the Sixth Circuit in *Fluor Daniel II* and one that is not followed in the instant *Fluor Daniel* case. As discussed above, the *FES* standard also fails to satisfy this Court's requirements in that it fails to require the General Counsel to match applicants to specific hiring decisions.

The state of the law is further confused by entirely different standards used in other circuits. For example, in *Ultrasystems Western Constructors v. NLRB*, 18 F.3d 251 (4th Cir. 1994), the Fourth Circuit determined that while the Board could establish liability without regard to job availability, it must consider the issue of job availability in the compliance stage before it could order back pay and instatement. Of course, in compliance, the burden of proof would be on the employer to prove lack of job availability instead of on the General Counsel to prove job availability.

In *Starcon, Inc. v. NLRB*, 176 F.3d 948 (7th Cir. 1999), the Seventh Circuit announced yet another standard. *Starcon* held that while the employer should be given the opportunity to show that it would not have hired individuals (presumably because there was no job in which to put them), the General Counsel need only show the number of alleged discriminatees who would have been hired (as few as one). Contrary to *Fluor Daniel II,* the Seventh Circuit held that the General Counsel did not have to match particular individuals to particular jobs.

Therefore, we are faced with at least five different standards. It is imperative that the Court now give proper guidance so that companies in Petitioner's position are not subjected to improper requirements and determined to be liable when the General Counsel has failed to establish a violation of the Act.

III. *FLUOR DANIEL II* ACCURATELY REFLECTS THE STANDARD REQUIRED BY SUPREME COURT PRECEDENT

In its 1998 *Fluor Daniel II* decision, the Sixth Circuit clearly and unequivocally set forth the required burdens of proof in a failure-to-hire case. Following the course laid down by the Supreme Court in *Transportation Management Corp.,* the Sixth Circuit stated the following:

> [T]here are two elements to a Section 8(a)(3) violation: anti-union animus, and the occurrence of a covered action—for example, a particular discharge, or a particular failure to hire. See *Transportation Management*, 462 U.S. at 395, 103 S.Ct. 2469. Under *Wright Line*, the General Counsel bears the burden of proving both of these elements, and the "burden . . . does not shift." *Ibid.*

Fluor Daniel II, 161 F.3d at 966 (emphasis added).

Both *Transportation Management Corp.* and *Fluor Daniel II* mean nothing more or less than the General Counsel must "prove" a "particular failure to hire." The Sixth Circuit could

not have been plainer when it stated, "[I]n a case like this the General Counsel must match applicants with available jobs as part of establishing the second element of his case." *Fluor Daniel II*, 161 F.3d at 968 (emphasis added).

There is no room in *Fluor Daniel II* or in *Transportation Management* for the generalized speculation that took place in the instant case. There is not a single instance in the present case where the Administrative Law Judge or the Board determined that an alleged discriminatee should have been hired in place of a specific person for a specific job. There is not a single time when the qualifications of any alleged discriminatee are compared to specific persons who were hired.

Instead of the specific, "particular" analysis required by *Fluor Daniel II* and *Transportation Management*, the Board deliberately chooses another, lesser way — one initially rejected by the Sixth Circuit and contrary to the directive of the Supreme Court. In its *FES* decision, the Board rejected *Fluor Daniel II's* instruction, finding it unpersuasive. *FES*, 331 N.L.R.B. at 15. Though the instant case decision acknowledges that "*FES* could be interpreted as requiring a slightly lesser showing," *Fluor Daniel*, 332 F.3d at 968, a more candid and correct observation would be that *FES* totally eviscerates the requirements of *Fluor Daniel II* and *Transportation Management*. There is no matching requirement in *FES*. There is no attempt in *FES* to satisfy the legitimate concern that the NLRB is trying to establish an unfair labor practice merely by showing anti-union animus. *Fluor Daniel II* warned against this faulty analysis when it stated the following:

> In short, the mere fact that an employer is shown to harbor anti-union animus, and that certain individuals were not hired by that employer, is insufficient to show a violation of Section 8(a)(1) and (3) of the Act.

Fluor Daniel II, 161 F.3d at 967.

Even a casual reading of the Board's decision in the present case reveals that this rejected showing is all that was done in the instant case.

FES represents not only a lesser — significantly lesser — standard, it embodies an incorrect one. In *Fluor Daniel II* the Sixth Circuit recognized that the *sine qua non* of a refusal-to-hire case is an actual hiring decision in the first place. While the logic of this position is compelling, the Board and the Sixth Circuit itself now ignore the statutory requirements. The Board does so in the name of expedience — it is simply easier to find liability if the Board has a lesser case to prove. The Sixth Circuit has apparently abandoned the correct standard in the name of deference to the Board. Neither reason is sufficient grounds to apply an incorrect standard.

The Circuit Court operates on the mistaken impression that even if *FES* is a lesser standard, the Board has adequately met its *Fluor Daniel II* standard. In fact, the Board's analysis does not even begin to satisfy the *Fluor Daniel II* standard. The Board does not identify "particular hiring decisions" or match one applicant to a job opening. Not a single applicant is compared to and matched against someone or anyone who was hired. The defendant does not have any idea what job, or on what date, the applicants were denied employment. This critical and required information is not mentioned in the opinions of the ALJ, or Board, or even now in the Circuit Court.

It is important to note that the Sixth Circuit's *Fluor Daniel II* analysis comports very well with this Court's analysis of discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e), *et seq.* The burden shifting analysis articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and its progeny, applies equally well to these failure-to-hire cases under the NLRA. The requirement that a plaintiff (in a Title VII case) or the General Counsel (in an NLRA case)

establish an actual violation of the Act as part of his prima facie case is not an onerous burden. *Fluor Daniel II* appropriately places that burden on the General Counsel.

IV. THE NLRB'S GENERAL COUNSEL CANNOT SATISFY HIS BURDEN OF PROOF WHEN HE MAKES NO ATTEMPT TO MATCH APPLICANTS WITH SPECIFIC JOB OPENINGS

Neither the Administrative Law Judge nor the Board made any attempt to match applicants to job openings as required by *Fluor Daniel II*. There is not a single instance of comparing "Applicant X" to the requirements of an electrician position, much less of comparing him to the person actually hired into that position. What did the Administrative Law Judge and the Board do? Nothing more than observe that because Fluor Daniel hired enough people during the life of the jobs (962 over two years at Palo Verde and 2800 over the year at Exxon), it should have hired these individuals. This sham analysis not only fails to satisfy *Fluor Daniel II*, it is meaningless on its face.

In total disregard for the facts, the Board argues that the Administrative Law Judge did something different (matching) in the present case than he did in the underlying case the Sixth Circuit reviewed in *Fluor Daniel II*. *See Fluor Daniel*, 332 F.3d at 968-69. App. at 12a. He, [the same ALJ], did nothing different — and there was no reason for him to have done so. He issued his decision in the present case in February 1998 and the Sixth Circuit reversed his prior decision when it issued *Fluor Daniel II* in November 1998. The Board's representation to the Sixth Circuit that the ALJ matched jobs is the type of total disregard for the record that has led the Court to find that "in the proceeding before us, the Administrative Law Judge expressly considered job availability and made factual findings that vacancies existed that the discriminatees were qualified to fill, and, further, that over

the life of both projects there were enough positions to have employed every discriminatee." *Id.* Clearly, the ALJ did not try to predict with his findings in the present case, the standards the Sixth Circuit would set nine months later in its *Fluor Daniel II* opinion. Moreover, his findings do not satisfy those standards.

First, the job life observations are irrelevant. The ALJ, and subsequently the Board, want to rely on the questionable observation that because Fluor Daniel hired a large number of individuals over the life of these two jobs, the company should have hired all of these alleged discriminatees. Obviously, the total number of jobs contains positions that were of no interest to specific individuals or even the alleged discriminatees as a group. The electrician does not care how many painters or carpenters were hired. The boilermaker does not care how many electricians were hired. Therefore, this job life number which is so central to the Board's position, is actually nothing more than smoke designed to obscure the real issues.

Second, the Sixth Circuit's recounting of the Board's findings illustrates the fundamental flaws in the Board's analysis. For example, at Exxon, while the Administrative Law Judge found applicants were qualified and that in August and September 1994, Fluor Daniel had specific need for electricians, pipefitters and welders, there is no finding that connects these two points — the critical finding would be that the applicants had valid, active applications on file at the time of the need for these positions, and still desired employment when the openings occurred. This critical finding is missing because it is not true. Individuals who had applied in February or March no longer had active applications in August and September. The detailed and critical analysis required by *Fluor Daniel II* is simply not present.

Likewise, the analysis regarding Palo Verde is flawed. The Court notes, as did the Board, that no voluntary union

organizers who submitted applications on June 6 and 23, 1994 were hired, nor were those who attempted to apply on June 27 — yet reports from 1995 show staffing needs. Again, where is the nexus between these points and where is the relevance? If the Administrative Law Judge and the Board had determined that specific hirings were made while the applications were active, that would be a point worth addressing. Staffing reports showing a need for certain crafts long after the individual applications had expired proves nothing. Moreover, the facts are that the few who did reapply at a time when there was a need were hired.[3]

There is another flaw in the analysis regarding Palo Verde. Implicit in the Board's, and ultimately the Court's opinion, is the assumption that because these persons had worked at Palo Verde under the prior employer, there must be the same jobs available under Fluor Daniel. This assumption is false. The plan all along was for Fluor Daniel to significantly reduce the size and scope of the base crew to reduce costs. The base crew went from mostly craftsmen to mostly carpenters and laborers. The facts simply do not lead to the conclusion that there were specific jobs available for these individuals when they had valid, active applications on file.

Finally, the real danger in the Board's analysis is seen in its assumptions regarding individual qualifications. Painting with the broad brush of assumed qualifications, the ALJ and Board ignore the fact that five individuals at Palo Verde (Shoemaker, Garcia, Stroud, Leslie and Rahn) are not mentioned in over 9,000 pages of testimony. An additional three (Case, Sanchez, and Cabrera) are mentioned only to the extent of having been present at a union meeting. There is no testimony or other evidence regarding the qualifications of

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[3] Mark Smith and Steve Horlacher, both Boilermaker union organizers, filled out second applications and were hired. In July 1995, Boilermaker Danny Garnica was hired for an upcoming outage.

any of these men. Yet everyone — the Administrative Law Judge, the Board, and even the Court — assumes they were qualified, should have been hired instead of those who were hired, and are now deserving of back pay.

Importantly, this very issue was addressed to the Administrative Law Judge when Fluor Daniel moved to dismiss those persons about whom no evidence was presented. In denying Fluor Daniel's motion, the Administrative Law Judge stated that such matters could be left to compliance. *Fluor Daniel II* specifically rejected this notion when it held that the obligation to match jobs was not appropriate for compliance:

> [W]e think it preferable to take up matters in their proper logical order by more carefully defining the NLRB's prima facie burden and leaving the NLRB with a broad panoply of remedies once a prima facie case is made out and a violation of the Act has been found on the facts.

Fluor Daniel II, 161 F.3d at 970.

The consequences of the Board's faulty assumptions described above are made glaring by the flawed analysis employed by the Board. Because the Board is able to avoid matching jobs to applicants as required by *Fluor Daniel II*, the Board is able to impose liability without proving a statutory violation. The Board ignores the missing connections in its argument leading to liability and claims these connections can wait until compliance – when, of course, the burden will be on the employer to disprove and not the Board to prove liability.

V. THE BOARD'S FAILURE TO MATCH APPLICANTS WITH SPECIFIC JOB OPENINGS DEPRIVES FLUOR DANIEL OF DUE PROCESS OF LAW

The *Fluor Daniel II* Court established clear requirements for the Board to follow in meeting its burden of proof: qualified applicant, an actual job, and anti-union animus. These requirements, in turn, derive from the statutory language Section 8(a)(3) of the NLRA that a violation must involve "discrimination in regard to hire . . ." Therefore, because the statute also places the burden of proof on the General Counsel of the NLRB (Section 10(c)), the General Counsel must prove an actual hiring decision occurred before he can establish a violation of the Act. The NLRB would skirt this requirement and impose liability without reference to a specific hiring decision. In other words, it would impose liability without the necessary finding of a statutory violation. The employer — having been found liable — now bears the burden of proof to show why it should not have to provide back pay to this person. When, as here, the employer is not given the opportunity to defend its hiring decision — because no specific decision is identified — yet it is found liable to persons who may not have been hired because of a lack of available jobs or acceptable qualifications, then that employer is denied due process. At a minimum such due process rights include not only the right to defend oneself, but also the right to avoid liability unless and until the General Counsel has satisfactorily established the required elements of a statutory violation.

Importantly, the *Fluor Daniel II* Court specifically rejected the Board's attempt to bypass statutory requirements and impose liability on a lesser showing:

> We therefore reject the NLRB's argument that it should be able to establish a prima facie case of an unfair labor practice in a refusal-to-hire case simply by proving the

> existence of anti-union animus and by showing that there were some job vacancies applied for by some voluntary union organizers and that Fluor Daniel harbored animus against these applicants because they engaged in activities protected by the Act.

Fluor Daniel II, 161 F.3d at 967 (emphasis in original).

In the present case, the NLRB has shown nothing more than that described by the above-quoted language. The Sixth Circuit rejected the Board's position in *Fluor Daniel II*, and due process demands that this Court do so now.

CONCLUSION

The petition for writ of certiorari should be granted for the foregoing reasons.

Respectfully submitted,

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